United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-2168

BRIEF FOR AMICUS CURIAE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2168

THE VERMONT NATURAL RESOURCES COUNCIL, ET AL.,

Plaintiffs-Appellants

v.

CLAUDE S. BRINEGAR, ET AL.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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September 12, 1974

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE VERMONT NATURAL RESOURCES COUNCIL, et al., Plaintiffs-Appellants, v. CLAUDE S. BRINEGAR, et al., Defendants-Appellees.	No. 74-2168

BRIEF OF AMICUS CURIAE
NATURAL RESOURCES DEFENSE COUNCIL, INC.

STATEMENT OF THE ISSUES PRESENTED[1]

1. Whether the District Court erred in concluding that it lacked jurisdiction to hear appellants' claim under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. § 1344, due to a failure to comply with the 60-day notice requirements of Section 505, 33 U.S.C. § 1365, after the District Court explicitly held that it had jurisdiction of plaintiffs' cause of action under the federal question statute, 28 U.S.C. § 1331, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706.

2. Whether construction projects which will discharge dredged or fill materials from draglines, bulldozers, dumptrucks and similar operations into the navigable waters of the United States as defined by FWPCA, such as the project involved in this case, require permits under Section 404 of FWPCA, 33 U.S.C. § 1344.

1/ Amicus will address only two of the issues involved in this case in the brief which follows. In addition, in the case of Conservation Society v. Secretary, Dkt. No. 73-2620 (2d Cir. 1973), which case will be argued on the same day as this case, Sept. 18, 1974, amicus has submitted a brief amicus curiae which addresses in detail the specific NEPA issue involved in this case, i.e., whether a NEPA statement prepared by State Highway Department officials is a statement prepared by the "responsible official" under Section 102(2((C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C).

INTEREST OF AMICUS IN THIS LITIGATION

This brief, filed with consent of all parties, addresses only those issues relating to the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 et seq. (hereinafter "FWPCA") and the District Court's disposition of appellants' claim under Section 404 of FWPCA. Specifically, we show, first, that the District Court erred when it dismissed appellants' Section 404 claim for the sole reason that appellants failed to meet the notice requirements of the Federal Water Pollution Act citizen suit provision, Section 505, Slip Op., at 32, and, second, that once this threshold issue is passed, appellants are correct in their contention that appellees' plans for Sleepers River involve the "discharge of dredged or fill material into the navigable waters" for which a permit is required under Section 404 of FWPCA.

Both the jurisdictional and merits issues raised by appellants' Section 404 claim are of extraordinary importance. If the District Court's interpretation of FWPCA's citizen suit provision were to prevail great injustice would be done by forcing aggrieved parties to delay sixty days before commencing actions where a temporary restraining order or preliminary injunction is needed and would otherwise be issued forthwith. A second area where such delay would have unfortunate consequences is in requiring compliance with FWPCA's many deadlines, particularly those applicable to the Environmental Protection Agency (EPA). FWPCA involves a series of inter-

dependent and carefully timed actions which must be taken by EPA, the states and polluters. When FWPCA's deadlines are missed and cannot be quickly enforced by concerned citizens, the water pollution abatement scheme of the Act begins to unravel.

On the merits, the fate of appellants' Section 404 claim could have the effect of deciding whether the provisions of FWPCA will be called into play to regulate the ongoing destruction of thousands of miles of natural streams and rivers across the United States by the process of channelization -- the gouging out with heavy earthmoving machinery of straight, sterile, silt-laden ditches which destroy and replace natural watercourses. After a major study on stream channelization prepared for the President's Council on Environmental Quality, scientists at the Philadelphia Academy of Natural Sciences concluded that

> "[A] common factor encountered in all channelized projects which they either studied or inspected was the nearly complete destruction of the biological productivity of the stream and wetland ecosystems . . . .
>
> "Among the physical factors which contribute to the breakdown, is the effect of an accumulation of silt and sand. Sediment results from dredging, from snagging and removing vegetation, from straightening the channel and changing the slope . . . . The resulting silt and sediment deposited in the stream remains unconsolidated, shifting back and forth within the confines of the channel. This lack of stabilization hampers the development of a food web sufficient to support a resident population of sport or commercial fishery. Academy scientists observed some instances where even the migratory fish populations suffered sharp declines or were completely eliminated."[2]

2/ Philadelphia Academy of Natural Sciences, "Know Your Environment - Channelization," 1973, at 3.

Thus, channelization is frequently totally contrary to FWPCA's most basic objective: "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. § 1251(a).

NRDC is highly qualified by interest and expertise to assist the Court in resolving the critical issues presented by this appeal. Indeed, NRDC is at present appellee in NRDC v. Train, Dkt. No. 74-1443 (D.C. Cir.), which raises the question of whether suits against the EPA Administrator must be brought under Section 505 in compliance with its 60-day notice requirement. The objective of the case was to secure a court-ordered schedule of publication dates for the effluent guidelines required by Sections 301(b) and 304(b) of FWPCA after the statutory deadline for publishing these guidelines had been missed by EPA. NRDC brought the suit under 5 U.S.C. §§ 701-706 (Administrative Procedure Act), 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act), 28 U.S.C. § 1331 (Federal Question), and 28 U.S.C. § 1361 (Action to Compel an Officer of the United States to Perform His Duty), and not under Section 505 of FWPCA in order to avoid unnecessarily delaying this important deadlines case. See NRDC v. Train, ___ F. Supp. ___, 5 ERC 1033 (D.D.C. 1973). The case on appeal has been fully briefed and will be argued September 24, 1974.

NRDC is also a plaintiff in a lawsuit involving a Soil Conservation Service stream channelization project, NRDC v. Grant, Civ. No. 754 (E.D.N.C., filed Nov. 30, 1971), in which the issue of

the need for a Section 404 permit for the project has been raised by plaintiffs and EPA.[3] See NRDC v. Grant, 355 F. Supp. 280 (E.D.N.C. 1973).

Finally, in NRDC v. Callaway, Civil No. 74-1242 (D.D.C., filed August 16, 1974), plaintiffs seek to require the Corps of Engineers to exercise its full mandatory jurisdiction under Section 404 of FWPCA. At present the Corps maintains it can limit its Section 404 program to traditionally "navigable" waters despite the fact that numerous courts have now held, consistent with EPA's position, that FWPCA's jurisdiction is much broader, extending for example to non-navigable tributaries and coastal marshes above mean high tide. See, e.g., United States v. Holland, ___ F. Supp. ___, 6 ERC 1388 (M.D. Fla. 1974); United States v. Ashland Oil and Transportation Co., 364 F. Supp. 349 (W.D. Ky. 1973).

NRDC is a non-profit organization organized and existing under the laws of the State of New York. Its principal office and place of business is located at 15 West 44th Street, New York, New York. It also maintains offices at 1710 N Street, N.W., Washington, D.C. and 664 Hamilton Avenue, Palo Alto, California. NRDC has a nationwide membership of about 20,000, composed of

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3/ EPA has stated the following in comments on a draft environmental impact statement in the NRDC v. Grant case: "Any discharge of dredged material or of fill material such as sand, rock, or suspended solids into 'waters of the United States' from a source including drag lines, back hoes, bulldozers, or dump trucks . . . will require a Section 404 permit from the U.S. Army Corps of Engineers." Letter from Jack E. Ravan, Regional Administrator, EPA Region IV, to Jesse L. Hicks, August 5, 1974.

educators, scientists, lawyers and other citizens dedicated to the defense and preservation of the human environment and the natural resources of the United States. The objectives of NRDC include maintaining and enhancing environmental quality, including the quality of the nation's waters, and monitoring the federal departments and regulatory agencies to ensure that the public interest is fully protected, and in particular to ensure that federal statutes are fully and properly implemented. NRDC has taken a particular interest in protection of streams and wetlands through a "Save Our Streams" program which has, over the last three years, included an intense national campaign to monitor stream channelization projects and to inform and assist local citizens and groups concerned with the problems of stream channelization and wetland drainage.

STATEMENT OF THE CASE

Amicus addresses only those issues arising from appellants' claim under Section 404 of FWPCA. This statement is limited to the facts and law relevant to these issues.

Appellees propose to rechannelize about 4800 feet of the Sleepers River in order to construct Interstate Highway I-91, including an interchange at St. Johnsbury and a relocation of part of U.S. Route 2. Part of the natural channel of the Sleepers River in this area will be dredged and excavated; other parts will be filled in with dirt and rock. The result of these activities -- which will be carried out by draglines, bulldozers, back hoes, dump trucks and similar earthmoving equipment -- will be the destruction of the natural channel of the Sleepers River and its replacement by an artificial channel. The construction activities will place substantial quantities of silt and sediment in suspension in the waters of Sleepers River. Ultimately the natural streambed will be occupied by structures or elevated portions of U.S. Route 2 and Interstate 91.

As a result of this proposed action, on June 17, 1974, appellants filed suit alleging, inter alia, that the appellees had violated Section 404 of the FWPCA, 33 U.S.C. § 1344, by failing to obtain a permit for the discharge of dredged or fill materials into the Sleepers River. Appellants alleged jurisdiction, under, inter alia, the federal question statute, 28 U.S.C. § 1331, and the

APA, 5 U.S.C. §§ 701-706.

The District Court held that it had jurisdiction of the cause of action under both these statutes, Slip Op., at 5, but also held that it lacked jurisdiction of the Section 404 claim due to plaintiffs' failure to comply with the 60-day notice provision of Section 505 of the FWPCA, Slip Op., at 30-31. As a result, the merits of plaintiffs' FWPCA claim were not considered by the District Court, although the Court previously had found that plaintiffs would be irreparably injured if construction of I-91 continued and that there was "a reasonably good chance of probable success on the merits as the defendants' failure to obtain the permits required by [Section 404 of the FWPCA]." Slip Op., at 3-4.

Upon an adverse decision by the District Court on all of appellants' claims, appellants promptly filed a notice of appeal and an application for stay pending appeal. On August 26, 1974, a three judge panel of this Court granted plaintiffs' motion for stay pending appeal.

ARGUMENT

I.
THE DISTRICT COURT ERRED IN CONCLUDING THAT IT LACKED JURISDICTION TO HEAR APPELLANTS' CLAIM UNDER SECTION 404 OF THE FEDERAL WATER POLLUTION CONTROL ACT

It is important to emphasize at the outset that the District Court explicitly held that:

> "Jurisdiction of this cause of action is clearly vested in this court under the federal question statute, 28 U.S.C. § 1331 (1970) . . . and the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. (1970) . . . ."
>
> Slip Op., at 5 (emphasis added).

Thus, regarding plaintiffs' FWPCA claim, a basic issue is whether the District Court can hold that it lacks jurisdiction over this claim after having determined that it has jurisdiction over plaintiffs' single cause of action.

The District Court held that because plaintiffs "failed to comply with the notice requirements contained in Section 505 of the Act, 33 U.S.C. § 1365,"[4] the District Court lacked jurisdiction of the claim that defendants had "violated the . . . permit requirements of the [Act]", 33 U.S.C. § 1344. Slip Op., at 30-32. As a result, the court did not consider the merits of plaintiffs' claim that

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4/ The Section 505 notice provision requires plaintiff to give the EPA Administrator 60 days notice prior to commencing an action. 33 U.S.C. § 1365. Regulations implementing Section 505 have been promulgated by EPA and are set out at 40 C.F.R. 135.2-.3.

defendants had failed to obtain a Section 404 dredge and fill permit in order to channelize 4800 feet of the Sleepers River for construction of Interstate Highway I-91.

The Court erred in holding that it lacked jurisdiction of plaintiffs' claim under the FWPCA, because: (1) the Section 505 citizen suit provision is not the exclusive remedy for violations of FWPCA and independent federal question and APA jurisdiction was established in this case, 28 U.S.C. § 1331, 5 U.S.C. §§ 701-706; and (2) even if the Section 505 60-day notice requirement were relevant to this case,[5] just exercise of the District Court's equity powers requires it to determine, on the merits and prior to expiration of the 60 days, if preliminary injunctive relief is warranted in light of an imminent change in the status quo and the possibility of irreparable injury to plaintiffs.

5/ First, the Section 505, 33 U.S.C. § 1365, notice requirements are applicable only to Section 505, and District Court jurisdiction of this case exists independent of Section 505. Second, in the many cases where the only basis for relief under FWPCA is Section 505, such as the typical suit against an individual polluter for violating the Act, the Section 505 notice requirements would apply. But even in such cases they must be interpreted with some flexibility to ensure that the basic clean water objectives of FWPCA are not thwarted by rigid and unwarranted application of the 60-day notice requirement and, in particular, to permit a court to prevent irreparable injury and changes in the status quo which would otherwise occur if legal action were delayed 60 days. See discussion at pages 15-17, infra.

A. Section 505 Of The FWPCA Is Not The Exclusive Remedy For Relief Under The Act

District Court jurisdiction over this case exists under the federal question statute, 28 U.S.C. § 1331, and the APA, 5 U.S.C. §§ 701-706, independent of Section 505, 33 U.S.C. § 1365. See holding of the District Court, quoted supra. Section 505(e) expressly preserves such jurisdiction by specifically providing that it is not the only and exclusive method for judicial review of violations of the Act:

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."
> Section 505(e), 33 U.S.C. § 1365(e).

Consistent with this position, district court jurisdiction of alleged violations of FWPCA has been repeatedly upheld under jurisdictional statutes other than Section 505 of the Act. Thus, the District Court for the District of Columbia expressly upheld Federal Question jurisdiction under 28 U.S.C. § 1331 in a case brought to compel the Administrator to perform a non-discretionary duty under FWPCA. Natural Resources Defense Council, Inc. v. Quarles, ___ F. Supp. ___ (Civil No. 1629-73, D.D.C., Feb. 1, 1974) (Order is attached as Attachment 1). In NRDC v. Quarles, the court

rejected arguments that Section 505's procedures are exclusive.[6] Moreover, in Scenic Hudson Preservation Conference v. Callaway, ___ F. Supp. ___, 6 ERC 1241 (S.D.N.Y. 1973), aff'd 6 ERC 1767 (2d Cir. 1974), plaintiffs alleged violation of Section 404 of FWPCA and established jurisdiction, inter alia, under the federal question statute, 28 U.S.C. § 1331 and the APA, 5 U.S.C. §§ 701-706. Jurisdiction under Section 505 was not alleged. The court granted plaintiffs permanent injunctive and declaratory relief based on their FWPCA claim and denied relief on plaintiffs' other claim.

District Court jurisdiction has also been found in several of the impoundment cases in which there was no jurisdictional allegation under Section 505 of the Act, and in which it was alleged that the Administrator has a non-discretionary duty to allot all funds appropriated by Congress for construction of waste treatment facilities.[7] Campaign Clean Water v. Ruckelshaus, 6 ERC 1104 (4th Cir.), aff'g 5 ERC 1441 (E.D. Va. 1973); Minnesota v. EPA, 5 ERC 1586

6/ It is also relevant that the U.S. Court of Appeals for the District of Columbia Circuit recently denied (July 24, 1974) without opinion, EPA's motion for a stay pending appeal in the case of NRDC v. Train, Dkt. No. 74-1433. See NRDC v. Train, ___ F. Supp. ___, 5 ERC 1033 (D.D.C. 1973). EPA's motion was based primarily on the argument that Section 505 establishes "the exclusive procedure for judicial review of the Administrator's actions under [the FWPCA]" and that plaintiff NRDC had "refused" to comply with Section 505. EPA Brief, at 7. The case has been fully briefed and argument is scheduled for Sept. 24, 1974. Amicus did not rely upon Section 505 in this case because it was brought to enforce FWPCA's important deadlines. See the discussion at page 4, supra.

7/ No such allegation was cited in the reported opinions.

(D. Minn. 1973); Texas v. Fri, 5 ERC 2021 (W.D. Tex. 1973).

A recent case under the Clean Air Act, 42 U.S.C. §§ 1857 et seq., which has a citizen suit provision essentially identical to Section 505 of the FWPCA, corroborates the decisions discussed above. Section 304, 42 U.S.C. § 1857h-2. City of Highland Park v. Train, ___ F. Supp. ___, 6 ERC 1464 (N.D. Ill., 1974), involved suit, inter alia, against the EPA Administrator for failing to promulgate regulations in conformity with deadlines established by the Clean Air Act. The Court held that plaintiffs had failed to comply with the notice requirement of Section 304 but explicitly found jurisdiction under 28 U.S.C. §§ 1331 and 1361. The court then dismissed the case under 28 U.S.C. § 1331, upon examination of the merits of plaintiffs' claims,[8] "for failure to state a claim upon which relief can be granted," and determined that "relief will not lie under 28 U.S.C. § 1361" because of its merits decision under Section 1331. City of Highland Park, 6 ERC at 1470&n.15, 1471.

The decisions in several other cases under FWPCA and the Clean Air Act hold that failure to comply with the 60-day notice requirements of the citizen suit provisions does not defeat District Court jurisdiction unless the claim for relief relies solely on these

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8/ The court stated that "[p]laintiffs' allegations that the Administrator has breached a statutory duty owed to them under the Clean Air Act Amendments . . . clearly bring the complaint within the purview of the general federal question statute and require an examination of the Clean Air Act to determine whether the claims are well founded.15" City of Highland Park, 6 ERC at 1470.

citizen suit provisions.[9] And even in such cases, the courts will generally determine if there has been substantive compliance with the notice requirements before dismissing the case. Thus, in City of Riverside v. Ruckelshaus, 4 ERC 1728 (C.D. Calif. 1972), plaintiff failed to provide the Administrator 60 days notice prior to filing its suit. The court determined that the 60-day notice requirement was met in substance since no action was taken by the Court until 60 days had passed. The court stated that "[d]uring that sixty day period the Administrator had all the beneficial effect of the sixty day notice provision, so the purposes of the provision were fulfilled." Id., at 1731. In Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F. Supp. 1089 (D.D.C. 1974), the District Court held that the filing of the first complaint constituted substantial compliance with the 60-day notice requirement when a second complaint was filed 60 days later prior to action by the Court on defendants' motion to dismiss. And rather than requiring new motions to be filed in the second suit, the court simply consolidated the actions.

In sum, District Court jurisdiction for violations of the FWPCA can rest on provisions other than Section 505 of the Act, and

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9/ Thus, for example, in City of Ventnor City v. Fri, ___ F. Supp. ___ (Civil Dkt. No. 1101-73, D.N.J., March 8, 1974), the court stated that "the sole statutory basis for jurisdiction upon which plaintiffs rely is 33 U.S.C. § 1365" [Section 505], and that "plaintiffs failed to give any notice whatever of this action . . . . Because plaintiffs failed to fulfill the notice requirement of § 1365(b), their suit based on § 1365(a) must fail for want of jurisdiction." Slip Op., at 1-2.

such jurisdiction is expressly provided by the savings clause of Section 505(e) and has been upheld by several court decisions. Since the District Court in this case held that jurisdiction was established under the federal question statute, 28 U.S.C. § 1331, and the APA, 5 U.S.C. §§ 701-706, the Court erred in dismissing the FWPCA claim for want of jurisdiction under Section 505.

B. The 60-Day Notice Requirement May Not Bar Judicial Relief To Prevent Irreparable Injury

Assuming arguendo that the Section 505 sixty day notice provision is relevant to the FWPCA claim in this case,[10] it should not be interpreted as a jurisdictional bar to prevent the District Court from granting preliminary injunctive relief which would otherwise be granted in order to prevent irreparable injury.[11]

10/ Even though District Court jurisdiction of this case exists and has been established independent of Section 505, see discussion in Section I.A, supra, at pages 11-15, there are many cases where the only basis for relief under FWPCA is Section 505, such as the typical suit against an individual polluter for violating the Act. In these cases the Section 505 notice requirements would apply, but even here they must be interpreted with some flexibility, as discussed in detail above, to ensure that the basic clean water objectives of the Act are not thwarted by rigid and unwarranted application of the 60-day notice requirement.

11/ The District Court found that plaintiffs would be irreparably injured if defendants were not enjoined from proceeding with construction of Interstate Highway I-91 across the Sleepers River, Slip Op., at 3-4, but subsequently determined that even though plaintiffs were likely to succeed on the merits of their Section 404 FWPCA claim, that jurisdiction of this claim was lacking. Slip Op., at 4, & passim.

The basic purpose of the 60-day notice requirement is to provide the Administrator (or other enforcement agencies) time to undertake self-enforcement of the Act by correcting violations brought to his attention pursuant to Section 505. See Report on the Act by Sen. Muskie, submitted during final Senate debate on the Conference Report, Leg. Hist.,[12] at 179 (". . . to give the appropriate administrative agencies a chance to act."); and Senate Report No. 72-414, 92d Cong., 1st Sess. 79-80 (1971), Leg. Hist., at 1497-98 ("The time between notice and filing should give the administrative enforcement office an opportunity to act on the alleged violation."). Thus, the central objective of the 60-day notice provision is to promote expeditious action to halt violations of the Act.

Therefore, in those cases where irreparable injury would occur prior to the expiration of the 60-day period, it is wholly consistent with and supportive of the Act's goals and the Section 505 citizen suit provision for the district court immediately to determine if preliminary relief is warranted without staying its hand for 60 days. It must be remembered that the filing of the suit in such cases constitutes substantive notice under Section 505, see City of Riverside v. Ruckelshaus, supra; Metropolitan Washington Coalition for Clean Air v. District of Columbia, supra, and that the defendants

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12/ Sen. Comm. on Public Works (Library of Congress), A Legislative History of the Federal Water Pollution Control Act Amendments of 1972 (Jan. 1973)(2 vols.).

could take appropriate action to correct violations of the Act prior to court determination of preliminary injunctive motions, thereby mooting the case. Thus, the 60-day notice requirement of Section 505 should not be interpreted to prevent the issuance of an otherwise appropriate preliminary injunction.[13]

13/ That is, the 60-day notice requirement should not bar examination of the merits of a claim in order to determine the likelihood of success on the merits, whether irreparable injury will occur, and the balance of the equities. See Virginia Petroleum Jobbers Ass'n. v. FPC, 239 F.2d 921, 925 (D.C. Cir. 1958).

II.
STREAM CHANNEL MODIFICATION PROJECTS SUCH AS THAT PROPOSED HERE REQUIRE PERMITS UNDER SECTION 404 OF FWPCA

In Scenic Hudson Preservation Conference v. Callaway, ___ F.2d ___, 6 ERC 1767 (2d Cir. 1974), affirming, 370 F. Supp. 162, 6 ERC 124, (S.D.N.Y. 1973), this Court held that discharging "dredged or fill material" into the Hudson River without a permit is unlawful under Sections 301(a) and 404 of the FWPCA. This Court adopted the District Court's view that "dredged or fill material" includes dredged spoil, rock and sand from any source and is not limited to materials discharged as a result of the dredging of ship channels in navigable waters. 6 ERC, at 1246. And the Court sustained the District Court's injunction against the Consolidated Edison project until the utility had obtained the required permit under Section 404. 6 ERC, at 1248.

On the relevant facts, the situation in this case is identical to that in Scenic Hudson Preservation Conference v. Callaway in all respects save one. Near Storm King Mountain and the Village of Cornwall, the Hudson River is unquestionably "navigable" in the classical sense, whereas the Sleepers River is best considered as a non-navigable tributary of a "navigable" river, the Passumpsic. Yet this is a distinction without a difference. From several recent court interpretations, it is evident that Congress intended FWPCA to apply to all surface waters of the United States, and not be limited to "navigable" waters in the classical sense of that term. See United States v. Holland, ___ F. Supp. ___, 6 ERC 1388, 1392-93 (M.D. Fla. 1974); United States v. Ashland Oil and Transportation Co., 364 F. Supp. 349, 351 (W.D. Ky. 1973); and United States v.

American Beef Packers, Inc., Crim. No. 74-0-30 (D. Neb., April 25, 1974). EPA, which has primary responsibility to implement the new Act and should therefore have primary jurisdiction to define its terms, has expressly stated that the jurisdiction of FWPCA extends beyond traditionally navigable waters to include "tributaries of navigable waters of the United States." 40 C.F.R. § 125.1(o), 38 Fed. Reg. 13529 (1973).

Accordingly, this Court's decision in Scenic Hudson Preservation Conference v. Callaway is controlling. Because appellees plan to discharge large quantities of dirt, rock and other "dredged or fill materials" into Sleepers River -- indeed, to fill in the entire natural channel in various places -- they must have a permit under Section 404 of FWPCA before they can proceed.

To amplify these conclusions, amicus will demonstrate in the remainder of this brief (A) that FWPCA prohibits the "discharge of pollutants" without a permit issued under the Act, (B) that the proposed rechannelization of Sleepers River would result in the "discharge of pollutants" within the meaning of FWPCA and thus requires a permit under the Act, and (C) that Section 404 establishes the appropriate permit program for the proposed Sleepers River rechannelization.

A. Section 301(a) Prohibits the Discharge of Pollutants Without a Permit

Both the language of the FWPCA and abundant legislative history make it clear that Congress intended that the discharge of any pollutants, including dredged or fill material, would be unlawful unless carried out pursuant to a permit issued under FWPCA. The "no discharge" policy of Section 301(a) is stated simply and unambiguously:

> "Except as in compliance with this section and section 302, 306, 307, 318, 402 and 404 of this Act, the discharge of any pollutant by any person shall be unlawful."

The only reasonable reading of this section is that unless the requirements of the other sections, including the permit requirements of Sections 318, 402 and 404, are met, the discharge of any pollutant is illegal. The legislative history in support of this view is unanimous. The House Public Works Committee, for example, in its report states:

> "Any discharge of a pollutant without a permit issued by the Administrator under section 318, or by the Administrator or the State under section 402 or by the Secretary of the Army under section 404 is unlawful." Legis. Hist. 787.

Amplifying on that point, the Senate Public Works Committee, in its discussion of Section 301, said:

> "This section clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program which permitted the discharge of certain amounts of pollutants under the conditions described above, this legislation would clearly establish that no one has the right to pollute." Id. at 1460. (Emphasis added.)

Addressing the requirements of Section 404 directly, the Conference Report states:

> "Failure to obtain a permit under this section, or failure to comply with the requirements of such a permit, would be a violation of section 301(a) and enforceable under section 309." Id. at 325.

The point that FWPCA prohibits any discharging without a permit was made again and again in the House. Congressman Hammerschmidt, a member of the Public Works Committee and a co-sponsor of the legislation, wrote, in material prepared as background for other members, that the permit program:

> "establishes a national discharge permit system requiring all point sources emitting effluents into navigable waters to obtain permits specifying allowable discharge levels." Id. at 403.

In a colloquy on the floor, Congressman Clausen, another Committee member, said:

> "Thus, we start off with the basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful." Id. at 378.

To this, Congressman Terry responded:

> "As you indicated in your remarks, Mr. Clausen, discharge from point sources would be unlawful unless they were in accord with permits issued by the State or the Environmental Protection Agency." Id. at 388.

EPA's own analysis of the bill was identical. In a letter to the Office of Management and Budget from William Ruckelshaus, then Administrator of EPA, urging the President to approve the Act, Ruckelshaus said:

> "No discharge of any pollutant will be permitted, except as authorized by a permit issued under the new Act." Id. at 147.

The Act and its history thus provide abundant support for the conclusion in Scenic Hudson Preservation Conference v. Callaway that "a reading of sections 301(a) and 404 indicates that Congress intended to ban outright the discharge of dredged spoil, rock and sand (§§ 301(a) and 502(6)), unless a permit is obtained under § 404 from the Corps . . . ." 6 ERC 1246. Accord Save Our Sound Fisheries Association v. Callaway, ___ F. Supp. ___ (D.R.I. Civ. No. 5297, March 5, 1974); United States v. Holland, ___ F. Supp. ___, 6 ERC 1388 (M.D. Fla. 1974).

B. The Construction Planned for Sleepers River Will Result in the "Discharge of Pollutants" Within the Meaning of Section 301(a)

Section 301(a) prohibits "the discharge of any pollutant" without a permit. The term "discharge of a pollutant" is defined in Section 502(12) as:

> "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." (Emphasis added.)

Thus, in order for the rechannelization of Sleepers River to require a permit, it must be shown that (1) "pollutants" will be discharged, (2) from a "point source," (3) into "navigable waters." It is clear that the proposed rechannelization of Sleepers River meets these requirements.

1. The Proposed Construction Will Result in the Discharge of Pollutants.

Section 502(6) of FWPCA defines "pollutant" as any:

> "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." (Emphasis added.)

The underscored are precisely the types of pollutants that will be discharged as a result of the construction at Sleepers River. During the construction dredged spoil, sand and silt will be discharged and put into suspension in the river, and as a result of the concentrated deposit of dredged spoil, solid waste, rock and sand, portions of the natural stream will be completely filled in.

2. The Discharges From the Construction Will Be Point Source Discharges.

The term "point source" is defined very broadly in Section 502(14) to include:

> "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

In an August 23, 1974, letter to Kenneth Grant, Administrator of the Soil Conservation Service, Alan G. Kirk, II, EPA General Counsel, states EPA's determination "that discharges from dump trucks, drag lines and bulldozers, for example, constitute discharges from 'point sources.'"[14] Mr. Kirk explained:

> "Dump trucks, drag lines and bulldozers constitute 'discernible, confined and discrete conveyances'. A recent decision by the United States District Court for the Middle District of Florida conforms this result. United States v. Holland, (No. 73-623 Civil T-A) (a copy of which is attached as Attachment 2).
>
> "In addition, Congress' intent that such activities be regulated under the Act is equally clear. Section 404 of the Act specifically provides for the regulation of discharges of dredged or fill material into the waters of the United States. Since dredged and fill material is customarily discharged into the waters of the United States from dump trucks, drag lines and bulldozers, it is inconceivable that Congress could have intended to regulate such discharges while at the same time excluding dump trucks, drag lines and bulldozers from its definition of 'point sources'."

In short, drag lines, steam shovels, bulldozers, trucks and other earthmoving equipment such as that to be used in the Sleepers River rechannelization are "point sources" within the

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14/ Mr. Kirk's letter is attached hereto as Attachment 2.

meaning of FWPCA.

3. Sleepers River Is "Navigable" Within the Meaning of FWPCA.

Of great significance in the present case, Section 502(7), 33 U.S.C. § 1362(7), defines "navigable waters" not by reference to navigability-in-fact or to the mean high water level, but as "the waters of the United States, including the territorial seas." From this clear language, the legislative history, and recent court interpretations discussed below, it can be seen that Congress intended FWPCA to apply to all surface waters of the United States, not to be limited to "navigable" waters in the classical sense of that term.

In enacting FWPCA, Congress recognized that the degradation of the Nation's waters cannot be prevented and biological integrity maintained, unless all sources are regulated. In its report on the original Senate bill, the Senate Public Works Committee explained:

> "The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, protions thereof, and their tributaries." Legis. Hist. 1495 (emphasis added).

The original House bill contained a more restrictive definition: "The navigable waters of the United States, including the territorial seas." Id. at 1069.

When the two bills went to the Committee on Conference, however, the word "navigable" was deleted from the House definition

of "navigable waters" in creating the final standard. The significance of that deletion was made clear in the Conference Report:

> "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." Id. at 327. (Emphasis added.)

In presenting the Conference version of the bill to the House of Representatives, Representative Dingell, a member of the Conference Committee, further amplified the term:

> "The Conference bill defined the term 'navigable waters' broadly for water quality purposes. It means 'all the waters of the United States' in a geographic sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." Id. at 250. (Emphasis added.)

Representative Dingell then concluded that:

> "Thus, the new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill." Id. (Emphasis added.)

In United States v. Holland, 6 ERC 1388, 1393 (M.D. Fla. 1974), which involved the application of FWPCA to non-navigable wetlands above the mean high water mark, the Court declared that the legislative history of FWPCA "manifests a clear intent to break from the limitations of the Rivers and Harbors Act to get at sources of pollution."* The legislative history of FWPCA, the Court continued, "[c]ompels the Court to conclude that the former test of navigability

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*/ The Rivers and Harbors Act has generally been limited to navigable-in-law waters.

was defined away in the FWPCA." Id. at 1392. Thus, the Court held that natural and man-made tributaries, and mangrove wetlands located above the mean high tide line and covered only by periodic high tides were "navigable waters" under the terms of FWPCA.**

Similarly, in United States v. Ashland Oil and Transportation Co., 364 F. Supp. 349, 351 (W.D. Ky. 1973), the Court found that navigability in the traditional sense "is excluded from the Act by definition." Defendant was charged under Section 311(b)(5), 33 U.S.C. § 1321(b)(5), for failing to immediately notify an appropriate federal agency after discovering that it had discharged oil into a non-navigable stream. It defended on the grounds that the Act applies only to the classically "navigable waters of the United States." The Court found the defendant guilty, rejecting the company's argument that FWPCA does not apply to non-navigable waters.

Finally, in United States v. American Beef Packers, Inc., Crim. No. 74-0-30 (D. Neb., April 25, 1974), the defendant moved to dismiss an indictment under Section 301(a) on the ground that the government had failed to allege that the discharge of pollutants was made into navigable waters. The Court denied this motion, citing Holland and Ashland Oil, supra, and holding that:

> "Congress has the power to define away the old navigability restriction and clearly intended to do so in the 1972 Amendments to the Federal Water Pollution Control Act." Id. at 1.

Consistent with these authorities, EPA has promulgated regulations demonstrating the broad scope of "navigable waters" as used in FWPCA. They define it to include:

**/ The Court had previously determined that none of the waters were navigable in the classical sense.

"(1) All navigable waters of the United States;

(2) Tributaries of navigable waters of the United States;

(3) Interstate waters;

(4) Intrastate lakes, rivers and streams which are utilized by interstate travelers for recreational or other purposes;

(5) Intrastate lakes, rivers and streams from which fish or shellfish are taken and sold in interstate commerce; and

(6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce."

40 C.F.R. 125.1(o), 38 Fed. Reg. 13528, at 13529 (1973).

Further elaboration of the EPA position is to be found in the June 19, 1974, letter from EPA Administrator Russell E. Train to General W.C. Gribble, Jr., Chief of the Corps of Engineers, attached hereto as Attachment 3. This letter was written to protest the Corps' decision to restrict the Section 404 permit program to traditionally defined "navigable waters" and its corresponding refusal to implement United States v. Holland, supra.[15] See the Corps' regulations at 39 Fed. Reg. 12115 (1974). In his letter, Mr. Train stated in part:

> "Our interpretation of 'navigable waters' within the meaning of the [Federal Water Pollution Control Act Amendments of 1972] does not conform to the Corps' recently issued regulation. We firmly believe that the Conference Committee deleted 'navigable' from [FWPCA's] definition of 'navigable waters' in order to free pollution control from jurisdictional restrictions based on 'navigability.'"

15/ It is this same refusal which has resulted in amicus' suit, NRDC v. Callaway, D.D.C. Civil No. 74-1242, discussed at page 5, supra.

EPA's position, and the position of appellants here, has received strong endorsement from the Department of Justice. In a letter to Alan G. Kirk, II, EPA General Counsel, dated August 15, 1974, Wallace H. Johnson, Assistant Attorney General for Lands and Natural Resources, stated that "The legislative history of the Act shows that Congress did not intend to limit the government's jurisdiction for environmental protective purposes to the same line of mean high water which limits the Corps' jurisdiction for navigational protective purposes, . . ."[16]

In sum, the Justice Department, EPA, the courts, Congress, everyone but the Corps recognizes that FWPCA in general and Section 404 in particular apply with full force to traditionally non-navigable waters such as Sleepers River.

C. Section 404 Establishes the Permit Program Appropriate for the Proposed Rechannelization of Sleepers River

Of FWPCA's several permit issuing provisions, see, e.g., Sections 318, 402, 404, and 405, Section 404 is the permit program applicable to the proposed rechannelization of Sleepers River. Section 404(a) provides:

> "The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." (Emphasis added.)

Section 404 goes on to give EPA a major role in deciding what are acceptable sites for the discharge of dredged or fill materials.

16/ Mr. Johnson's letter is attached hereto as Attachment 4 . The question of whether Section 404 applies above mean high tide has become the cutting edge of the debate over the scope of Section 404. Legally, this question is the same as whether Section 404 extends to non-navigable tributaries.

In its regulations under Section 404, the Corps defines "dredged material" as "any material excavated or dredged from navigable waters of the United States including any runoff or overflow which occurs during a dredging operation or from a contained land and water disposal area." 39 Fed. Reg. 12119 (1974). The regulations also define "fill material" to include "any material deposited or discharged into navigable waters which may result in creating fastlands or other planned elevations of lands beneath navigable waters." Id.

The Corps' regulations thus precisely describe the types of activities and discharges that are proposed by appellees for Sleepers River: the excavation and dredging in the riverbed resulting in discharges of sand, silt, rock and other materials, and the deposit of similar materials in the riverbed resulting in the creation of fastland.

CONCLUSION

For the reasons stated herein, amicus respectfully urges the Court (1) to reverse the decision of the District Court which held that it lacked jurisdiction to hear appellants' Section 404 claim, and (2) to hold that appellees must obtain a Section 404 permit before they can lawfully proceed with the contemplated rechannelization of Sleepers River.

Respectfully submitted,

J.G. [illegible]ETH
EDWARD L. STROHBEHN, JR.

Natural Resources Defense Council, Inc.
1710 N Street, N.W.
Washington, D.C. 20036
(202) 783-5710
Attorneys for Amicus Curiae

DATED: September 12, 1974

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the Brief for Amicus Curiae in the case of The Vermont Natural Resources Council, et al. v. Claude S. Brinegar, et al., No. 74-2168, to be delivered to the persons noted below in the manner indicated:

1. By hand delivery to Edmund B. Clark, Esq., Land and Natural Resources Division, Room 2339, U.S. Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, attorney for Appellee;

2. By deposit in the United States mail, postage prepaid, properly addressed, airmail and special delivery, to:

(a) Harvey Carter, Esq.
115 Elm Street
Bennington, Vermont

(b) William B. Gray, Esq.
U.S. Attorney's Office
Federal Building
Rutland, Vermont

(c) Edward Zuccaro, Esq.
Attorney-at-Law
St. Johnsbury, Vermont

(d) Robert C. Schwartz, Esq.
Commissioner's Office
Department of Highways
Montpelier, Vermont

Edward L. Strohbehn, Jr.
Natural Resources Defense Council
1710 N Street, N.W.
Washington, D.C. 20036
(202) 783-5710
Attorney for Amicus Curiae

September 12, 1974

ATTACHMENT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Plaintiff,

v.

JOHN R. QUARLES, JR.,
Acting Administrator
Environmental Protection Agency

and

ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Civil Action No. 1629-73

ORDER

This matter came before the Court on defendants' motion to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. By Order of December 21, 1973, this Court stayed discovery by plaintiff pending disposition of the jurisdictional and standing issues raised by defendants' motion to dismiss.

Plaintiff raises numerous grounds in support of this Court's jurisdiction. An extensive discussion is unnecessary since jurisdiction exists by virtue of 28 U.S.C. § 1331 (1970). The complaint clearly raises a question which arises under a law

of the United States, namely the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. § 1342(a), 1345. The amount in controversy exceeds ten thousand dollars, exclusive of costs and interest, whether measured by the value of the rights asserted by plaintiff or by the cost of compliance by defendants if plaintiff prevails on the merits. Contrary to defendants' assertions, sovereign immunity does not raise a bar to this court's jurisdiction.

Defendants also argue that plaintiff lacks standing to maintain this action. It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972). The organization has standing if it alleges that its members have suffered an injury in fact. Id. The Complaint in the instant case specifically alleges that plaintiff's members have suffered and will continue to suffer a specific and perceptible harm as a result of defendants' actions. It is of no consequence that the injury suffered by plaintiff's members may be shared by many individuals. United States v. Students Challenging Regulatory Agency Procedures, supra.

Upon the foregoing, it is this 1st day of February, 1974,

ORDERED that defendants' motion to dismiss be, and the same hereby is, denied.

Thomas A. Flannery

UNITED STATES DISTRICT JUDGE

ATTACHMENT 2

Return to
511W

AUG 23 1974

Mr. Kenneth Grant
Administrator
U.S. Department of Agriculture
Soil Conservation Service
Washington, D. C. 20250

Dear Mr. Grant:

By letter dated April 20, 1973, you inquired whether the Department of Agriculture, Soil Conservation Service, would require a permit under the Federal Water Pollution Control Act, as amended, in order to construct a channelization project in the Chicod Creek, North Carolina. By letter dated May 8, 1973, based upon the facts available to me at that time, I concluded that all of the Chicod Creek was subject to the jurisdiction of the Federal Water Pollution Control Act as constituting part of the "waters of the United States", that the Chicod Creek itself did not constitute a "point source" under the Act and that pollution resulting from construction activities such as the construction of the Chicod Creek Project would not constitute pollution emanating from a "point source".

In a recent meeting between EPA and Soil Conservation Service personnel questions were raised about the fourth paragraph of my May 8, 1973, letter, a copy of which is attached. This paragraph reads as follows:

> Moreover, a review of the facts reveals that no valid distinction can be drawn between the sediment problem associated with the construction of such projects as the Chicod Creek Project, and other construction activity related sources of pollution. The Congress clearly contemplated that such sources of pollution were not point sources, and were to be controlled pursuant to the authorities and requirements of section 208 of the Act. See Section 208(b)(2)(H).

The purpose of this paragraph was to point out that runoff from construction areas would not be deemed by us to constitute discharges from "point sources". However, it is clear that discharges from dump trucks, drag lines and bulldozers, for example, constitute discharges from "point sources".

Section 502(14) of the Act defines "point source" to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." Dump trucks, drag lines and bulldozers constitute "discernible, confined and discrete conveyances". A recent decision by the United States District Court for the Middle District of Florida confirms this result. United States v. Holland, (No. 73-523 Civil T-A) (a copy of which is attached).

In addition, Congress' intent that such activities be regulated under the Act is equally clear.. Section 404 of the Act specifically provides for the regulation of discharges of dredged or fill material into the waters of the United States. Since dredged and fill material is customarily discharged into the waters of the United States from dump trucks, drag lines and bulldozers, it is inconceivable that Congress could have intended to regulate such discharges while at the same time excluding dump trucks, drag lines and bulldozers from its definition of "point sources".

The conclusion reached in my letter of May 8, 1973, stated that "we do not believe that erosion or sedimentation which may result from the construction of the project constitutes the 'discharge of a pollutant' under the FWPCA, requiring a permit under Section 402." This conclusion relates solely to the question of the need for a permit under the Act with respect to runoff from construction activity. Where point sources, such as dump trucks, drag lines and bulldozers are used to deposit material into the "waters of the United States" the proscription of Section 301 of the Act applies and such discharges are prohibited in the absence of an appropriate permit under Section 402 or Section 404 of the Act. I hope that this information will clarify any uncertainty which may have arisen out of our previous communications.

Sincerely yours,

Alan G. Kirk, II
Assistant Administrator for
Enforcement and General Counsel (EG-329)

Enclosures

AGDW:JHHoward:ncd:8/9/74:x50760

ATTACHMENT 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 19 1974

THE ADMINISTRATOR

Dear General Gribble:

As you are undoubtedly aware, on March 15, 1974, the U.S. District Court for the Middle District of Florida issued a Memorandum Opinion in United States v. Holland. In that case, the United States sought to enjoin disposal without a permit of dredged material in wetlands which were above the mean high water line but were periodically inundated by tidal waters. The court held, inter alia, that wetlands above the mean high water line are subject to Federal jurisdiction under Section 404 of the Federal Water Pollution Control Act, as amended (the "FWPCA") and that discharges of dredged material into such areas "constituted discharges entering 'waters of the United States'."

The result reached in U.S. v. Holland is a jurisdictional milestone under the FWPCA. Wetlands above, and below, the mean high water line are of vital importance to our environment. The Corps has taken an admirably firm position to protect wetlands below the mean high water line. Recently issued Corps regulations stated that: "As environmentally vital areas, [wetlands] constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest." 33 CFR Section 209.120(g)(3). Our concern is that similar protections be provided for wetlands above the mean high water line.

We believe that the Holland decision provides a necessary step for the preservation of our limited wetland resources. Moreover, we are firmly convinced that the court properly interpreted the jurisdiction granted under the FWPCA and Congressional power to make such a grant.

Notwithstanding the decision in U.S. v. Holland and the recognized importance of wetlands to the environment, we have been informed that the Corps has declined to acquiesce in the Holland decision and has advised Corps installations not to accept applications for permits under FWPCA Section 404 for dredge and fill disposal in these areas. The Department of Justice has taken the position that it will not bring enforcement action against persons disposing of dredged or fill material in wetland areas without Section 404 permits so long as the Corps refuses to issue such permits. As a consequence, wetland areas above the mean high water line are presently unprotected from the irreparable damage caused by the disposal of dredged and fill materials.

So that this important and irreplaceable part of the environment will not go unregulated, I strongly urge the Corps of Engineers to reconsider its position and to commence processing Section 404 permits for wetlands above the mean high water line immediately. I would appreciate the opportunity to discuss this matter with you at your earliest convenience.

A separate but related matter also requires attention. On April 3, 1974, the Corps of Engineers promulgated final regulations with respect to Corps permits for various activities in navigable or ocean waters. 39 Federal Register 12115. Among other things, these regulations set forth certain procedures for the issuance of permits for the disposal of dredged or fill material under Section 404 of the FWPCA.

Of particular concern to the Environmental Protection Agency is the definition of "navigable waters" set forth in these regulations, 33 CFR Section 209.120(d)(1). In proposed regulations published on May 10, 1973 (38 Federal Register 12217), the Corps proposed to define the term "navigable waters" to mean "waters of the United States, including the territorial sea," in accordance with the definition of "navigable waters" in the FWPCA. The final regulations promulgated on April 3, 1974, deleted the previous definition of "navigable waters" and substituted therefor the following:

> "The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce (See 33 CFR 209.260 for a more complete definition of these terms)."

The preamble to the final regulation discusses the Corps' reasons for changing the definition and makes it clear that the term "navigable waters of the United States" as used in the Rivers and Harbors Act of 1899 and the term "navigable waters" as defined in the FWPCA are to be "treated synonymously." The preamble and the reference to the Corps' definitional regulation at 33 CFR 209.260 make it clear that the Corps intends to delineate FWPCA Section 404 jurisdiction on the basis of court decisions and Corps interpretations of "navigability." Our interpretation of "navigable waters" within the meaning of the FWPCA does not conform to the Corps' recently issued regulation. We firmly believe that the Conference Committee deleted "navigable" from the FWPCA definition of "navigable waters" in order to free pollution control from jurisdictional restrictions based on "navigability." Indeed, as the Conference Report

states with respect to the modified definition of "navigable waters": "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. 92-1236, 92d Cong., 2d Sess. at 144. Perhaps a meeting of the appropriate personnel of the Corps and of EPA should be scheduled to resolve these discrepencies.

Sincerely yours,

/s/ John Quarles

Russell E. Train
Administrator

Lt. General W. C. Gribble, Jr.
Chief, Corps of Engineers
DAEN-ZA
Forrestal Building
Washington, D. C. 20314

Prepared by:
AGDW:JHoward:ncd:6/4/74:50760:Rm.509

ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES
DIVISION

ATTACHMENT 4

Department of Justice
Washington

RECEIVED
AUG 2 1974
WF COUNSEL

August 15, 1974

Alan G. Kirk II, Esquire
Assistant Administrator for
Enforcement and General Counsel
Environmental Protection Agency
Fourth and M Streets, S.W.
Washington, D.C. 20460

Dear Alan:

I am very concerned over the apparent inability of the Environmental Protection Agency and the Corps of Engineers to agree on the guidelines required by section 404 of the Federal Water Pollution Control Act of 1972 for use in issuing permits under that section. Without the guidelines, the Corps of Engineers is unable to exercise its full regulatory authority over dredge and fill activities and the Department of Justice is severely hampered in its ability to bring enforcement actions to require compliance with section 404.

It is my impression that a major obstacle to the promulgation of these guidelines has been the disagreement between your Agency and the Corps of Engineers over the boundaries of regulatory jurisdiction provided by the Federal Water Pollution Control Act, and this disagreement has been highlighted by Administrator Train's letter of June 4, 1974, to General Gribble. In the hope of bringing about a speedy resolution of this disagreement, let me state our Department's position on this matter.

Prior to the enactment of the Federal Water Pollution Act in 1972, the Corps of Engineers exercised control over the Nation's waters primarily through the Rivers and Harbors Act of 1899, and primarily for the purpose of protecting and improving

their navigable capacity. Numerous court decisions have held that the Corps' jurisdiction under the Rivers and Harbors Act extended only to the line of mean high water, or, in littoral areas, to the line of mean high tide. Although regulation up to this point may be sufficient to protect navigation, it is clearly inadequate to achieve the objective of the Federal Water Pollution Control Act, which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." §101, FWPCA.

To achieve this environmental objective the Act exercises regulatory jurisdiction beyond the line of mean high water or the line of mean high tide, which lines, by definition, are not the outer limits of the area subject to the regime of the waters, but are only an intermediate limit. Section 301 prohibits the discharge of any pollutant, including dredge spoil, sand, and biological materials, except as in compliance with several other sections, including section 404. Section 404 vests the Secretary of the Army, acting through the Chief of Engineers, with the authority to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites. The term "navigable waters" is defined by section 502(7) as "waters of the United States, including the territorial seas."

The legislative history of the Act shows that Congress did not intend to limit the government's jurisdiction for environmental protective purposes to the same line of mean high water which limits the Corps' jurisdiction for navigational protective purposes, and in fact, two Federal courts thus far have held that the Federal Water Pollution Control Act authorizes the exercise of jurisdiction over water for water quality purposes landward of the line of mean high water: United States v. Holland, 373 F. Supp. 665 (M.D. Fla., 1974); United States v. Ashland Oil and Transportation Co., 364 F. Supp. 349 (W.D. Ky., 1973).

We recognize that there are technical problems in establishing a formula to delineate Federal jurisdiction under section 404. Nevertheless, we feel that by consulting with appropriate scientists and other experts, the obstacles can be surmounted. An approach that we believe has particular merit is defining jurisdiction in terms of those areas containing biota dependent on the regular inundation of waters, other than rainwater.

On July 18, 1974, the Attorney General reaffirmed the Justice Department's commitment to vigorous enforcement of the laws protecting wetlands. Citing wetlands cases as a top priority of the Land and Natural Resources Division, Mr. Saxbe enumerated the invaluable functions served by wetlands. For almost two years the Federal Government has failed to exercise its authority to regulate the entirety of these critical areas that form a biologically interdependent whole. We urge you to assign high priority to reaching an agreement on the section 404 guidelines that will provide for the protection of the entire ecosystems dependent upon unpolluted and undisturbed waters, rather than just that part arbitrarily delineated by mean high water.

Sincerely,

Wallace H. Johnson
Assistant Attorney General

cc: Manning E. Seltzer, Esquire
Office of General Counsel
U.S. Army Corps of Engineers
Department of the Army
Washington, D.C. 20310